

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
WESTERN DIVISION

C.S. YOUNGBLOOD AND WIFE  
EVA YOUNGBLOOD

PLAINTIFFS

V.

NO. 2:99CV122-B-B

SHELTER INSURANCE COMPANY  
AND FEDERICO HERNANDEZ

DEFENDANTS

Memorandum Opinion

This cause comes before the court on the plaintiffs' motion to remand. The court has duly considered the parties' pleadings, memoranda and exhibits and is ready to rule.

The plaintiffs brought this action in state court seeking compensatory damages for defendant Hernandez's alleged negligence<sup>1</sup> and uninsured/underinsured insurance proceeds under their automobile policy issued by defendant Shelter Insurance Company [Shelter]. Shelter removed this cause on the ground of diversity jurisdiction. The notice of removal asserts that Hernandez is not a United States citizen and that the complaint misplead or fraudulently pled Hernandez's Mississippi citizenship.<sup>2</sup> The complaint alleges that both the plaintiffs and Hernandez are resident citizens of Tate County, Mississippi; Hernandez furnished an invalid Tate County, Mississippi post office address in the accident report.<sup>3</sup>

The complaint seeks damages in the sum of \$100,000 from Hernandez and an unspecified amount of uninsured/underinsured motorist [UM] benefits from Shelter. The complaint further

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<sup>1</sup>While operating a vehicle insured by Shelter Insurance Company [Shelter], plaintiff Eva Youngblood was allegedly rear-ended by a vehicle operated by defendant Hernandez. The accident occurred in Senatobia, Tate County, Mississippi. Eva Youngblood seeks damages for bodily injuries and her husband, C.S. Youngblood, alleges a derivative loss of consortium claim.

<sup>2</sup>The notice of removal also alleges fraudulent joinder of Hernandez on the ground that the plaintiffs' claims against him are "barred by the applicable statute of limitations and the Plaintiffs have failed to assert any claim against Hernandez [upon] which relief may be granted."

<sup>3</sup>According to the affidavit of Susie B. Price, a certified legal assistant for the plaintiffs' counsel, the City Clerk's office in Senatobia, Mississippi advised Price that the Post Office verified that a business rented the post office box designated as Hernandez's address in the accident report, i.e., P.O. Box 220, Senatobia, Mississippi 38668.

seeks a declaratory judgment declaring that the plaintiffs are insureds under the subject policy and are “entitled to any and all benefits provided [under] said policy.” The plaintiffs move to remand on the ground that no process can be served on Hernandez and that the plaintiffs’ claims against Shelter do not independently meet the jurisdictional threshold of \$75,000.<sup>4</sup>

The plaintiffs are the named insureds under the subject policy providing UM limits of \$25,000 per person. For purposes of the instant motion, Shelter concedes that plaintiff Eva Youngblood is entitled to stack the UM benefits of two covered vehicles totaling \$50,000 under the subject policy. The plaintiffs contend that Shelter’s maximum exposure is \$50,000.<sup>5</sup> Shelter contends that the complaint for declaratory judgment as to entitlement to “any and all benefits provided [under] said policy” places more than \$50,000 in issue. Shelter asserts that since the policy provides a limit of \$25,000 for property damage (UMPD) and a limit of \$2000 for medical payments, its potential exposure is \$77,000. The plaintiffs have submitted copies of a check in the sum of \$4925.46 issued by Shelter to the plaintiffs for property damage coverage and a release expressly discharging Shelter of any further liability under the UMPD provisions of the policy for property damage arising out of the subject accident. The check and release are dated February, 1997 two years prior to the commencement of this cause in state court.

The plaintiffs assert that since the property damage issue has been settled, Shelter cannot now claim that the \$25,000 UMPD coverage is in controversy. The plaintiffs state that UMPD benefits are “not part of Plaintiffs’ complaint for damages.”<sup>6</sup> The plaintiffs’ assertion is the equivalent of a statement of intent in drafting the complaint. Not only would the plaintiffs be precluded from recovering UMPD benefits in this cause but also the plaintiffs acknowledge their waiver of any additional UMPD benefits. The court finds that the plaintiffs’ rebuttal and exhibits

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<sup>4</sup>See 28 U.S.C. § 1332(a).

<sup>5</sup>Plaintiff C.S. Youngblood seeks insurance proceeds for loss of consortium under the per person limit of Eva Youngblood’s UM coverage.

<sup>6</sup>See Plaintiffs’ rebuttal at 2.

clarify any ambiguity in the language of the complaint for declaratory judgment, i.e., the reference to “any and all benefits” does not contemplate benefits for which the plaintiffs were no longer eligible at the time of the filing. Moore v. Toyota Motor Corporation, 64 F. Supp. 2d 612, 613-14 (N.D. Miss. 1999) (citations omitted).

The court further finds that since the plaintiffs’ entitlement to UMPD benefits is not in issue, such benefits must be excluded from the amount in controversy. The plaintiffs are not seeking and cannot recover insurance proceeds in excess of the jurisdictional minimum of \$75,000. *See Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 n.14 (5<sup>th</sup> Cir. 1995) (plaintiff’s showing that he is “legally bound to accept less” than the jurisdictional minimum defeats removal). Therefore, the court lacks jurisdiction over the plaintiffs’ claims against Shelter, independent of the claims against Hernandez.

In the alternative, Shelter contends that the claims against Shelter and Hernandez can be aggregated for jurisdictional purposes and that the court has original jurisdiction over the claims against Hernandez and supplemental jurisdiction over the claims against Shelter. *See* 28 U.S.C. § 1367(a) (supplemental jurisdiction over claims “so related to claims in the action within [the court’s] original jurisdiction that they form part of the same case or controversy”).<sup>7</sup> It is undisputed that Hernandez is an alien<sup>8</sup> and that he has not been located.<sup>9</sup> Susie B. Price, a certified legal assistant for the plaintiffs’ counsel, states in her affidavit that she could not serve process on Hernandez since she could not obtain a valid address for Hernandez. Shelter does not

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<sup>7</sup>Shelter asserts that the \$100,000 claimed against Hernandez should be considered in calculating the amount in controversy, but asserted in its notice of removal that Hernandez’s citizenship, even if nondiverse, should be disregarded for purposes of determining whether diversity of citizenship exists in this cause. *See supra* note 2.

<sup>8</sup>The accident report identifies Hernandez as an alien.

<sup>9</sup>Price’s affidavit sets forth her efforts to serve process on Hernandez as follows: Upon inquiry, the City Clerk’s office of Senatobia, Mississippi found no utilities or tax records regarding Hernandez. In addition, the Tate County Sheriff’s Department advised Price that the department had no records in its possession that indicated any address for Hernandez and no knowledge of his whereabouts. *See supra* note 2.

dispute that Price made a diligent search and inquiry. The plaintiffs assert that although pled in the complaint, no damages can be assessed against Hernandez since he cannot be located for service of process. The plaintiffs further assert that Shelter is the only defendant “involved in the lawsuit now”<sup>10</sup> and that the amount in controversy is limited to the maximum amount recoverable under the subject policy against Shelter.

Hernandez was unserved at the time of removal and remains unserved. Rule 4 (m) of the Federal Rules of Civil Procedure provides for dismissal without prejudice of a claim against a named defendant who is not served within 120 days after the filing of the complaint, absent a showing of good cause for the plaintiff’s failure to serve process. The 120-day limitations period expired one day after the removal of this cause.<sup>11</sup> The complaint was filed more than ten months ago and the plaintiffs have neither requested an extension under Rule 4(m)<sup>12</sup> nor expressed any intention to make further attempts to locate Hernandez.<sup>13</sup> The court finds that the claims against Hernandez should be disregarded for jurisdictional purposes since he was unserved at the time of removal, he remains unserved and the plaintiffs have indicated no further interest in serving process on him. Without service of process on Hernandez, no damages can be recovered against him. Therefore, the court concludes that the amount of damages pled against Hernandez should not be included in the calculation of the amount in controversy just as the citizenship of a fraudulently joined defendant is disregarded for diversity of citizenship purposes.<sup>14</sup> This

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<sup>10</sup>See Plaintiffs’ supporting memorandum at 2.

<sup>11</sup>Rule 4(m) expressly does not apply to service in a foreign country. However, the plaintiffs have made no attempt to serve process outside the United States.

<sup>12</sup>Fed. R. Civ. P. 4(m) reads in part:

[I]f the plaintiff shows good cause for the failure [to serve process], the court shall extend the time for service for an appropriate period.

<sup>13</sup>The plaintiffs state: “No process was **ever issued** for Hernandez since no valid address **could ever** be obtained.” See Plaintiffs’ supporting memorandum at 1 (emphasis added).

<sup>14</sup>The possibility of recovery against a particular defendant is the test for fraudulent joinder. Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992) (“In evaluating fraudulent

rationale is consistent with the language of 28 U.S.C. § 1441(b) (diversity actions “shall be removable only if none of the parties in interest **properly joined and served** as defendants is a citizen of the State in which such action is brought”) (emphasis added)). The court finds that it has neither independent nor supplemental jurisdiction over the plaintiffs’ claims against Shelter.

For the foregoing reasons, the court finds that the amount in controversy does not meet the jurisdictional requisite and thus precludes diversity jurisdiction over this cause. Therefore, the motion to remand is well taken and this cause must be remanded for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c).

An order will issue accordingly.

THIS, the \_\_\_\_ day of January, 2000.

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NEAL B. BIGGERS, JR.  
CHIEF JUDGE

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joinder claims . . . [w]e are . . . to determine whether [the non-removing party] has any possibility of recovery against the party whose joinder is questioned.”), cited in Burden v. General Dynamics Corp., 60 F.3d 213, 216 (5<sup>th</sup> Cir. 1995).